IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 175

INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellants,

vs.

INLAND WATERWAYS CORPORATION, CARGILL, INCORPORATED, NORRIS GRAIN COMPANY, ET AL.,
Appellees.

REPLY BRIEF FOR THE ALTON RAILROAD COMPANY AND OTHER WESTERN CARRIERS, APPELLANTS.

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This brief is in reply to the brief for Inland Waterways Corporation, Cargill, Incorporated, Norris Grain Company, Rosenbaum Brothers, Santa Fe Elevator Corporation and Continental Grain Company, appellees.

The Assailed Order of the Interstate Commerce Commission Is Not Judicially Reviewable Under the Urgent Deficiencies Act.

Appellees Inland Waterways Corporation *et al.* take issue with our contention that the challenged order of the Commission is not a final administrative order. At page 38 of their brief they say:

"There is no reason why they [appellees] should be

compelled to begin another proceeding if the Commission should have acted in this case so as to prevent action by the eastern railroads which would be in derogation of their statutory rights."

In *United States* v. *Merchants Assn.*, 242 U. S. 178, a case directly in point here, a similar argument was unavailing. In that case this Court had before it an amended order entered, after extended hearings, by the Interstate Commerce Commission in *Commodity Rates to Pacific Coast Terminals*, 32 I. C. C. 611, 34 I. C. C. 13. The order granted transcontinental carriers relief from the long-and-short-haul clause of Section 4 of the Interstate Commerce Act, and authorized them to establish, in accordance with limitations prescribed in the order, rates from eastern shipping points to ports on the Pacific coast lower than the rates established to interior coast cities. Many shippers had participated in the hearings before the Commission. Representatives of four interior cities, alleging that they had appeared in whole or in part at these hearings, applied to the Commission for a rehearing. When their application was denied they, joined by others, brought suit to enjoin the enforcement of the amended order and the tariffs filed pursuant thereto. In holding that they had failed to exhaust their administrative remedies this Court, in an opinion by Mr. Justice Brandeis, said at page 188:

> "The carrier is the only necessary party to the proceeding under § 4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least in the absence of such participation. And if the rates made by tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, §§ 13 and 15 afford ample remedy. Respondents contend that, after the amended order was entered and the tariffs filed, they did apply to the Commission for relief 'but were denied the right of a hearing' and that

> 'their protest and demand were ignored and denied.' What they did was to petition for a 'rehearing' in the proceedings under the Fourth Section, to which they now say they were not parties, instead of applying for redress under § 13, as they had a legal right to do. They mistook their remedy. To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; and, as this case illustrates, the attempt of the court to remove some alleged unjust discriminations might result in creating infinitely more."

The decision in *United States* v. *Merchants Assn., supra*, is directly applicable here. In an investigation and suspension proceeding under Section 15(7) the carrier proposing a change in rates is the only necessary party. The Commission is the representative of the public. While it is customary to permit interested persons to be heard in such proceedings, the Act makes no provision for notice to them. If such persons participate in the hearings they may be bound by the order entered, but the order does no more than remove a barrier erected by the Commission (instead of by the Act, as in proceedings under Section 4) to the establishment of new rates. The order does not constitute a final administrative determination of the lawfulness of any rates any more than action by the Commission in refusing to suspend in the first instance constitutes such a final administrative determination. Any expressions in the report of the Commission which might indicate that it believes the proposed rates would be lawful have no binding effect in any subsequent proceeding. *Tagg Bros.* v. *United States*, 280 U. S. 420, 445. Appellees in the present case mistook their remedy. That remedy is a formal complaint under Sections 13 and 15, and, if such a complaint were filed, the Commission would be bound to entertain it. *Baird* v. *Interstate Commerce Commission*, 194 U. S. 25, 39.

To permit appellees to seek redress in the courts from an order discontinuing an investigation and suspension proceeding "would invade and often nullify the administrative authority vested in the Commission" to determine whether or not a carrier should be permitted to initiate new rate policies. The remark of this Court in *United States* v. *Merchants Assn.*, *supra*, that "the attempt of the court to remove some alleged unjust discriminations might result in creating infinitely more" is particularly pertinent here; for the attempt of the court below to remove some supposed discriminations has actually resulted in continuing in effect a manifestly unreasonable and discriminatory rate structure. *Cf. Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 548.

The order of the Commission in the case at bar presents an even stronger case for the application of the doctrine that the administrative remedy must be exhausted before the courts may take jurisdiction than the order of the Commission in *United States* v. *Merchants Assn.*, *supra*. The order in that case expressly conferred upon the carriers authority to establish rates which they could not have established without the order. The order in the present case does not command or authorize the establishment of any rates. It merely vacated the suspension order "as of December 22, 1941" (R. 77), and the eastern lines were legally free to place the tariffs in effect on December 23rd if they had elected so to do. Their right to place the tariffs in effect was given by the statute, and not by the order of the Commission. *Diamond Tank Transport* v. *United States*, 23 F. Supp. 497, 501 (D. C. W. D. Wash.).

Appellees contend (Br. 34) that the assailed order was entered by the Commission "pursuant to the power conferred upon it by the Section 15(1) of the Act to determine and fix reasonable, nondiscriminatory, and nonprejudicial rates for common carriers by railroad." Section 15(1) of the Act, as its context clearly shows, relates

to existing rates, and authorizes the Commission, if it finds that any such rate is or will be unlawful, to determine and prescribe the rate to be thereafter observed. The proceeding before the Commission in which the assailed order was entered was had under Section 15(7), which relates to proposed rates. These proposed rates never became effective because the Eastern Lines voluntarily postponed the operation of the tariffs beyond the statutory seven-month period pending the determination of the proceeding. (R. 18—246 I. C. C. 353, 354.)

It is true, as counsel for appellees say (Br. 37), that Section 15(7) provides that "the Commission *may* make such order with reference thereto [*i. e.*, the suspended rate] as would be proper in a proceeding initiated after it had become effective." This language must be read in the light of the issue before the Commission in the investigation and suspension proceeding, which, by the terms of Section 15(7), is "a hearing concerning the lawfulness of such [proposed] rate." The general practice of the Commission, when it finds a proposed schedule will not be lawful, but is of the opinion that the carrier is entitled to make some change in its rates, rules or regulations, is to order the suspended schedule canceled without prejudice to the filing of a new schedule in conformity with the findings and suggestions contained in its report. See, *e. g.*, *Petroleum from South Atlantic Ports to Southeast*, 245 I. C. C. 23; *Agricultural Implements Within the South*, 245 I. C. C. 153; *Lumber from North Carolina to New York*, 245 I. C. C. 231; *Estimated Weights on Fruits and Vegetables*, 245 I. C. C. 479; *Office Supplies from Gloucester, Mass. to Chicago*, 245 I. C. C. 669. Cf. *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522, 527-8. If in the course of the hearing in an investigation and suspension proceeding it appears that a large rate structure is unjustly discriminatory, and that the rates proposed by the carrier would remove part of the discrimination, the Com-

mission may properly vacate its suspension order and permit the proposed rates to take effect; for the carrier should not be prevented from placing the proposed new rates in operation merely because the entire maladjustment, which is not in issue in the investigation and suspension proceeding, would not be cured unless other new rates were also established.

Counsel for appellees argue (Br. 37) that the word "may" should be read as "shall." The Commission after careful consideration of this very question in *Salt from Louisiana Mines to Chicago*, 69 I. C. C. 312, held that it has no duty to fix and determine new rates in an investigation and suspension proceeding when it finds that the proposed rates would not be lawful. In that case the Commission said at page 313:

> "The duty of specifying in what respect and to what extent the new rate will be lawful or unlawful is not laid upon us, although we 'may' make any order which would be proper in a proceeding pending upon complaint.
>
> "That it was not the intention of Congress to require us in every suspension proceeding to specify what rates would be lawful in lieu of the new rate proposed, as, for example, in the case before us, to all destinations over a stretch of main line approximating 850 miles in length, clearly appears from other provisions of section 15. These limit the suspension period to 150 days [now 7 months], fix 30 days as the minimum time within which our orders shall take effect, and expressly require that 'the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible'."

After pointing out that its power to suspend extended to the operation of any schedule, the Commission, at pages 313 and 314, further declared:

> "Plainly our statutory duty does not vary with the number or nature of the items in the suspended sched-

> ules. If respondents' contention is sound we can be called upon to readjust the entire rate structure of an important section of the country during the slender margin of time which remains after the hearing on the schedules under suspension. Such an interpretation would nullify the evident purpose of the statute that we expedite decision in these cases. During the year ended October 31, 1921, 207 proceedings, including that here considered, were instituted upon our investigation and suspension docket.
>
> "Our power of suspension has existed since 1910. It has been exercised in over 1,500 cases. Many deal with hundreds of rates, some with thousands, and one with more than a million. Many involve rate structures built upon adjustments of great complexity. In the majority of these cases we have found that the rates, charges, or other tariff provisions under suspension had, or had not, been justified. Our practice in this regard, which accords with our interpretation of section 15 of the act, has been uniform during all of this time, and the Congress has not seen fit specifically to require us to do what respondents here suggest as our duty. In the several amendments made since 1910, and particularly when re-enacting paragraph (7) of section 15 in 1920, the Congress has manifested no inclination to impose such a duty upon us."

The situation is not, as appellees assert (Br. 34), precisely the same as if the proposed rates had become effective and the Commission had dismissed a formal complaint by appellees attacking those rates. In an investigation and suspension proceeding under Section 15(7) the Commission determines whether it should or should not interfere with the right of a carrier to initiate a new rate. At common law carriers had the right to initiate rates, and this primary right has not been taken from them by the Interstate Commerce Act. *Arizona Grocery Co.* v. *Atchison Ry. Co.*, 284 U. S. 370, 384; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 522; *Interstate Commerce Commission* v. *L. & N. R. Co.*, 227 U. S. 88, 92. The Commission is given

power to hold a proposed change in rates in abeyance for a temporary period only, and the statute provides that if the proceeding is not concluded within the period of suspension "the proposed change of rate • • • shall go into effect at the end of such period."

The power to determine whether proposed rates should be suspended for investigation, as this Court has said, "was entrusted to the Commission only." *Board* v. *Great Northern Ry. Co.*, 281 U. S. 412, 429. If the Commission decides to undertake an inquiry into the lawfulness of the proposed rates, and, after hearing, concludes, as it did here (R. 55), that "the proposed schedules are shown to be just and reasonable and are not shown to be otherwise unlawful," and then discontinues the proceeding (R. 77), it does no more than to say that it sees no good reason why it should further interfere with the right of the carrier to initiate new rates. It does not make any final administrative determination that the new rates are just, reasonable and nondiscriminatory, or prescribe any rate. Appellees concede (Br. 35-6), as they must, in view of *Board* v. *Great Northern Ry. Co.*, *supra*, that the administrative determination as to whether or not it will suspend a proposed tariff in the first instance is within the sole discretion of the Commission. The character of the Commission's action in lifting a suspension is essentially no different from its action in determining in the first instance whether or not it should suspend.

It is suggested by appellees (Br. 36) that there is an important difference between the initial and subsequent determinations in that the former is made without hearing and the latter after hearing. The justiciability of an order of the Commission, however, is not dependent upon whether or not it was entered after a hearing. Many orders entered after hearing have been held not judicially reviewable. *Delaware & Hudson Co.* v. *United States*, 266 U. S. 438; *United States* v. *Los Angeles R. R.*, 273 U. S.

299; *Piedmont & Northern Ry. Co.* v. *United States*, 280 U. S. 469; *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522; *United States* v. *Griffin*, 303 U. S. 226; *Shannahan* v. *United States*, 303 U. S. 596. Thus, even if it were true, as appellees assert, that the Commission committed error after hearing in the proceeding in which the assailed order was entered, the fact remains, as was said in *United States* v. *Los Angeles R. R.*, *supra*, at page 313:

> "There is the fundamental infirmity that the mere existence of error in the final valuation [referred to in the statute as an order] is not a wrong for which Congress provides a remedy under the Urgent Deficiencies Act."

It is suggested (Br. 35) that the prosecution of a formal complaint before the Commission would be a futile undertaking "since it must be assumed that in any new proceeding the Commission would construe the statute precisely as it has done in this proceeding and would arrive at the same ultimate conclusions." In *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269, 272-3, it was held that a taxpayer could not recover taxes, alleged to have been illegally exacted, without first complying with the statutory requirement that he file a claim for refund with the Commissioner of Internal Revenue, notwithstanding the fact he had good reason to anticipate that the claim would be rejected because like claims had consistently been disallowed by the Treasury. The rule that the administrative remedy must be exhausted applies even though the statute does not make exhaustion of that remedy a condition precedent to the right to resort to the courts. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50-1; *United States* v. *Sing Tuck*, 194 U. S. 161, 167, 170. As is well stated in *Vom Baur on Federal Administrative Law*, at Sec. 227:

> "It is a rule of substance that the legislative process must be completed before judicial relief is sought, and any specific complaint of an administrative nature must first be addressed to and carried through such

> legislative machinery as is available. The fact that some sort of administrative determination has been made obviously places no barriers across related legislative pathways which remain untrodden."

It is by no means certain, however, that the filing of a formal complaint would be a futile gesture. In the present investigation and suspension proceeding the issues were narrowly confined by Section 15(7) of the Act, and also by the terms of the order of investigation (R. 16), to the lawfulness of the proposed tariffs. As the Commission itself stated, "in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-and-rail rates lower than the combinations." (R. 54, 55.)

In the present case the Commission lifted a previous suspension. The enforcement, in such a proceeding, of the rule of judicial administration "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted" (*Myers* v. *Bethlehem Corporation*, 303 U. S. 41, 50) would cause no greater inconvenience to shippers than the action of the Commission when refusing to suspend in the first instance.

The doctrine of *Arizona Grocery Co.* v. *Atchison Ry. Co.*, 284 U. S. 370, that the Commission in a complaint proceeding cannot retroactively condemn as excessive a rate which it previously prescribed has no application in cases of unjust discrimination, and does not apply in cases where a rate is found unreasonable if the Commission, in a prior case, has done nothing more than vacate a suspension order. *Kansas City Ice Co.* v. *Atchison Ry. Co.*, 215 I. C. C. 616, 619. Any injury which the shippers might sustain pending the hearing and determination of their formal complaint is no ground for circumventing the rule requiring exhaustion of the administrative remedy before applica-

tion may be made to the courts. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50-2.

To permit resort to the courts for review of an order of the Commission which does nothing more than lift a suspension, when the complainant at that time has not exhausted his administrative remedy, would work undue hardship on the carrier. The carrier has convinced the Commission, after hearing, that it should vacate its suspension order and thereby remove the Commission-erected barrier to the effort of the carrier to try out its proposed new experiment in rates, subject to the risk that they might in a subsequent proceeding be found unlawful and damages be awarded. If judicial review of action by the Commission in lifting a suspension is permitted at such a stage in the prescribed administrative procedure, proposed rates, the effective date of which has already been delayed because of the suspension proceeding, could, as is the case here, be further delayed indefinitely in contravention of the statute, which provides specifically that, unless permanently suspended, the effective date may not be delayed for a longer period than seven months.

The Undue and Unreasonable Discriminations and Preferences Which Are Created When the Rail Proportional Rate From Chicago Is Permitted to Apply in Combination With an Inbound Barge Rate to Make a Through Barge-Rail Charge.

Appellees argue at length about some discrimination which, under their construction of the statute, they say will arise if, in accordance with the judgment of the Commission, the suspended schedules should be permitted to take effect. The same argument was presented to the Commission, but the Commission had before it positive evidence of wholly inexcusable discriminations and preferences in favor of appellees which are inherent in the

present rate structure, which are manifestly unfair and without reason, which exist because a rail proportional rate is allowed to apply in connection with a barge rate to make a through barge-rail charge, and which will be eliminated if the Commission has its way.

(a) *Barge-rail shipments*—Morris, Illinois, a point west of Chicago on the Illinois River, is some 60 miles more distant from New York than is Chicago. Upon arrival in Chicago, barge grain is unloaded into storage elevators. The rail service performed in transporting a local shipment from Chicago to New York is identical in all respects with the rail service performed in the transportation of a barge-rail shipment from Morris to New York.

The rail rate to New York on a local shipment from Chicago is 34½ cents. To New York from Morris the combined barge and rail charge on a barge-rail shipment is 28.75 cents, or 5.75 cents less than the Chicago rate. This offends against fairness and reason. Assuming the barge rate from Chicago to Morris is no greater than the barge rate from Morris to Chicago, a Chicago shipper, rather than to consign a shipment from Chicago direct to New York by rail, would have a lesser total transportation charge to pay if the shipment first moved from Chicago to Morris by barge and thence was transported as a barge-rail shipment from Morris through Chicago to New York.

It is no answer to say that local shipments out of Chicago are rare. To New York and to other eastern destinations the local rates from Chicago are in line with the local rates from origin points both west and east of Chicago. From the west to the east the rail rates are graded down as the distance and the service decrease

For example, to New York from Fort Wayne, Indiana, the rate is 30 cents, 4½ cents less than the rate from Chicago. By permitting the Chicago proportional rate to apply in combination with the barge rate, the through barge-

rail charge from Morris becomes, as stated, 28.75 cents. A barge-rail shipment pays 28.75 cents for transportation from Morris through Chicago and through Fort Wayne to New York, while a similar shipment to New York from Fort Wayne pays 30 cents. The barge-rail shipment might well be in the freight train which picks up the Fort Wayne shipment.

The Commission referred to the charges on barge-rail shipments in comparison with the rates from rail stations intermediate between origins and destinations on the barge-rail routes. (Report of the Commission, Division 2, 246 I. C. C. 353, 374—R. 18; Report of the Commission on Reconsideration, 248 I. C. C. 307, 310—R. 52.) At page 310 of the Report on Reconsideration the Commission said:

> "To trunk-line territory, the inbound barge movement represents a very small proportion of the total haul. The distance from Morris to Chicago by river, 57.5 miles, plus 880 miles rail short line to New York is 937.5 miles. The water portion of the haul is but 6 per cent. To this territory, the barge-line combinations are far below the local rates from the reshipping points in contravention of the fourth-section rule, while the all-rail rates are in strict conformity with that rule." (R. 52-3.)

In the Report by Division 2 it is stated that the combination of the barge rates to Chicago and the rail proportionals beyond results in lower through charges on domestic shipments than the local rail rates to the same destinations from all intermediate stations between Chicago and a north and south line through Fort Wayne and other points bordering on the Ohio-Indiana state line. (Page 374—R. 18.)

The Commission stated (Report on Reconsideration, 248 I. C. C. 307, 311—R. 54) and this Court has recognized (*Bd. of Trade of Kansas City* v. *U. S.*, 314 U. S. 534, 539) that proportional rates from a market are, in essence, bal-

ances of through rail rates. Being the balance beyond the market of the through rate, the measure of a proportional rate necessarily depends upon and is related to the measure of the through rate and to the measure of the inbound rate. In such circumstance it seems absurd for appellees to say (Br. 48) that the reasonableness of a proportional rate must be tested independently of and without regard to either the through rate or the inbound rate, and to say (Br. 49) that, in testing the reasonableness of the rates beyond the market by the combinations they produce, the Commission exceeded its authority. Whatever the measure of the balance or proportional rate is, or whatever the measure of the inbound rate is, the statute requires that, when combined, the through rate must be reasonable and non-discriminatory. Whether the through rate is reasonable and non-discriminatory depends upon the measure of the proportional rate and of the inbound rate. The lawfulness of the through rate also depends upon the measure of other competitive rates. If this were not so equality of treatment, which the statute requires, would be impossible of accomplishment.

Furthermore, all of the through rates to the east on grain from points west of Chicago could have been prescribed or published in conformity with the requirements of the statute by stating them as joint one-factor rates* rather than as separately stated rates into Chicago and as separately stated balances or proportional rates beyond Chicago. Had that been done, there would be no occasion for the present controversy and no basis for the contention of appellees as to violations of Sections 2 and 3.

(b) *Truck shipments*—Grain raised on farms in the west, northwest and southwest to be sold ordinarily is

* In this connection it is stated at page 6 of our Brief dated December 16, 1942, that the 35½ cent rail rate to New York from Morris is not stated in the tariffs as a joint one-factor rate. This statement is in error. The rate from Morris and the rates from certain other points in Illinois are published as joint one-factor rates. (Ex. 13, p. 13—page 72 of Record of Exhibits.)

trucked to a country elevator at the nearest station. Whether the farm is 1 mile, 15 miles or 30 miles from the station, and irrespective of the distance trucked, the local rate from the station applies when the grain is transported by rail.

Only the grain firms in a position to provide facilities for handling grain at barge origin points can handle barge grain advantageously. After the barge movement began in 1933 or 1934, it became necessary for at least one of the larger grain companies to bring corn to Chicago by truck in order, so far as possible, to meet the new competition created by the barge movement. (R. 492, 498, 499.) This company will unload in one day as much as 15,000 to 30,000 bushels from trucks. (R. 494.) In 1939 it trucked about 4,000,000 bushels of corn to Chicago. (R. 493.) A good part of the corn which arrives in Chicago by truck comes from the same producing territory in which the barge corn is grown. (R. 493.) If grain moved to Chicago by truck is shipped to the east by rail, the local rate from Chicago applies just as the local rate from any country station applies when grain trucked to that station moves out by rail. In no other manner may the integrity of a rate adjustment be preserved; for every local shipment transported by rail has had some form of prior movement or some form of prior transportation before any rail service is performed. A commodity produced or manufactured on or in the vicinity of the station platform, or in the vicinity of industrial or team tracks, or at more distant points, requires movement or transportation to or into the car by hand, hand-truck, motor-truck or by some other method before rail transportation may begin.

The witness appearing for the grain firm which moves a substantial volume of corn into Chicago by truck stated that "if the reshipping rates are to continue to apply on barge grain it is our conviction that such reshipping rates should be applied also on truck grain." (R. 493.)

What is stated above presents but a few of the problems confronting the Commission when it decided to lift its previous suspension. We deny that the proposed tariffs will deprive appellees or anyone else of any right which they have under the statute. But whatever the situation may be in this respect, the Commission has weighed "the prospective gains and hurts," and decided that, at this stage of the administrative process, it should no longer delay the proposed change in rates. With this determination the courts should not interfere. *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 547-8; *United States* v. *Merchants Assn.*, 242 U. S. 178, 188.

Respectfully submitted,

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